Perkasa Padu Sdn Bhd v Rayong ak Nuing & Ors

HIGH COURT (MIRI) — SUIT NO 22–30 OF 2004(MR)
HAMID SULTAN JC
17 JULY 2008

Civil Procedure — Injunction — Anti-suit injunction — Anti-suit injunction to restrain defendants from pursuing proceedings in the United States of America (US) — Whether injunction ought to be granted — Whether plaintiff entitled to orders as of right under s 41 of the Specific Relief Act 1950 — Whether there were merits in plaintiff's claim

Labour Law — Employment — Contract of employment — Whether non-production of employment agreement was fatal to plaintiff's case — Whether plaintiff entitled to anti-injunction order and/or declaration to restrain defendants from pursuing proceedings in US as of right under s 41 of the Specific Relief Act 1950 — Whether plaintiff's claim was frivolous, vexatious, oppressive and an abuse of process of court

The plaintiff was at all material times engaged in the supply of manpower to oil and gas companies worldwide. According to the plaintiff the first defendant was employed by the plaintiff to work as a stalking machine operator with Stolt Inc, a company registered in the Bahamas, to work in the Gulf of Mexico. The second and third defendants were the parents of the first defendant. The plaintiff claimed that the first defendant had induced the plaintiff to employ him and to enter into an employment agreement dated 20 April 2001 with him, by representing to the plaintiff that he was never awarded benefits from industrial injury or illness; that he was never treated for depression and; that he was never treated as an alcoholic. However, it later transpired that these representations were false in that the first defendant had been a crew member of a construction barge which capsised and that as a result of this accident the first defendant had developed a post-traumatic disorder and become an alcoholic. In addition the first defendant had filed a personal injury suit in respect of the said accident and received an out of court settlement of US$220,000. It was the plaintiff's contention that if the first defendant had disclosed that he had received benefits from industrial injury or illness, the plaintiff would not have entered into the employment agreement with him. As such, the plaintiff claimed that it was entitled to, inter alia, a declaration that the employment agreement was null and void, an injunction against the defendants or their servants or agents from prosecuting

the suit that they had instituted in the United States ('the US suit'), a declaration that the plaintiff was entitled to be fully indemnified by the defendants against all claims arising from the US suit, special damages and general damages. The plaintiff submitted that s 41 of the Specific Relief Act 1950 ('the Act') conferred on the plaintiff a right to seek a declaration and that a declaration may be awarded to one whose legal rights are being threatened. The plaintiff also submitted that in the circumstances of the case, the court should exercise its discretion to award the declaration because the plaintiff had no alternative remedy. The defendants contended that the plaintiff had not adduced any evidence to show that there was an employment agreement dated 20 August 2001 between the plaintiff and the first defendant. Instead the defendants submitted that the first defendant was at all material times an employee of Stolt Offshore Inc and that before the accident on the barge and as at 15 May 2001, the first defendant was a physically and mentally fit person to work as a rigger. In short the defendants' submission that the plaintiff's non-production of the employment agreement was fatal and showed that the plaintiff's claim was frivolous, vexatious, oppressive and constituted an abuse of the process of the court. The defendants also further asserted that in this case where the plaintiff had sought an anti-suit injunction and declaration to restrain the defendants from prosecuting in a US suit against a third party, the plaintiff had not shown why the Malaysian courts should interfere with the US suit especially when it concerned claims against third parties.

Held, dismissing the claim with costs:

(1) Relief in the nature of declaratory orders cannot be claimed as of right under s 41 of the Act. Any relief in the nature of declaration and/or injunctive orders is discretionary in nature and to secure such relief, full and frank disclosure is necessary and essential. However, the plaintiff in this case had failed to provide full and frank disclosure of all material facts to the satisfaction of the court (see paras 5 & 14(i)).

(2) The plaintiff was not seeking a substantial remedy but a declaratory order and/or injunctive order for a collateral purpose, which was to defeat or to defend an action in a foreign jurisdiction. On such facts, the court would be reluctant to exercise its discretion when it was seen to be a case of multiplicity of proceedings and/or collateral purpose (see para 14(ii)).

(3) The plaintiff had not made out a prima facie case for the reliefs sought for in law and as such there were no merits in the plaintiff's suit and evidence seeking declaratory and/or injunctive relief (see para 14 (iii)).

[Bahasa Malaysia summary

Plaintif adalah pada kesemua masa material terlibat dalam pembekalan tenaga pekerja kepada syarikat-syarikat minyak dan gas di seluruh dunia. Menurut plaintif, defendan pertama diambil bekerja oleh plaintif sebagai operator mesin 'stalking' dengan Stolt Inc, sebuah syarikat berdaftar di Bahamas, untuk bekerja di Telok Mexico. Defendan-defendan kedua dan ketiga adalah ibu bapa defendan pertama. Plaintif mendakwa bahawa defendan pertama telah menyebabkan plaintif mengambilnya bekerja dan memasuki perjanjian pekerjaan bertarikh 20 April 2001 dengannya, dengan menjelaskan kepada plaintif bahawa dia tidak pernah diawardkan faedah daripada kerugian perusahaan atau penyakit; bahawa dia tidak pernah dirawat untuk kemurungan dan; bahawa dia tidak pernah dirawat sebagai kaki botol. Walau bagaimanapun, ia kemudiannya diketahui bahawa kesemua keterangan ini adalah palsu di mana defendan pertama pernah menjadi anak kapal baj pembinaan yang terbalik dan bahawa akibat daripada kemalangan tersebut defendan pertama telah mendapat gangguan selepas traumatik dan menjadi kaki botol. Selanjutnya, defendan pertama telah memfailkan tindakan kecederaan diri berkaitan kemalangan tersebut dan menerima penyelesaian di luar mahkamah sebanyak US$220,000. Ia adalah hujahan plaintif bahawa jika defendan pertama telah mengemukakan yang dia menerima faedah daripada kerugian perusahaan atau penyakit, plaintif tidak akan memasuki perjanjian pekerjaan dengannya. Oleh itu, plaintif mendakwa bahawa ia berhak kepada, antara lain, perisytiharan bahawa perjanjian pekerjaan tersebut adalah terbatal dan tidak sah, injunksi terhadap defendan-defendan atau agen mereka daripada menjalankan tindakan yang mereka telah mulakan di Amerika Syarikat ('tindakan AS'), pengisytiharan bahawa defendan berhak untuk keseluruhan rugi ditanggung oleh defendan-defendan terhadap kesemua tuntutan yang bangkit daripada tindakan AS tersebut, ganti rugi khusus dan ganti rugi am. Plaintif berhujah bahawa s 41 Akta Relief Spesifik 1950 ('Akta tersebut') memberikan kepada plaintif hak untuk memohon perisytiharan dan bahawa perisytiharan boleh diawardkan kepada sesiapa yang hak undang-undangnya diancam. Plaintif juga berhujah bahawa dalam keadaan kes ini, mahkamah patut menjalankan budi bicaranya untuk mengaward perisytiharan tersebut kerana plaintif tidak mempunyai remedi alternatif. Defendan-defendan berhujah bahawa plaintif tidak mengemukakan apa-apa keterangan untuk menunjukkan bahawa terdapat perjanjian pekerjaan bertarikh 20 Ogos 2001 di antara plaintif dan defendan pertama. Sebaliknya defendan-defendan berhujah bahawa defendan pertama pada kesemua masa pekerja Stolt Offshore Inc dan bahawa sebelum kemalangan di atas baj dan pada 15 Mei 2001, defendan pertama adalah orang berupaya secara fizikal dan mental untuk bekerja sebagai pemasang pelantar minyak. Pendek kata hujahan defendan-defendan bahawa plaintif tidak mengemukakan perjanjian pekerjaan adalah cacat dan menunjukkan

bahawa tuntutan plaintif adalah remeh, menyusahkan, menindas dan membentuk penyalahgunaan proses mahkamah. Defendan-defendan juga selanjutnya menegaskan bahawa di dalam kes ini di mana plaintif telah memohon injunksi anti-tindakan dan perisytiharan untuk menghalang defendan-defendan daripada menjalankan tindakan AS terhadap pihak ketiga, plaintif tidak menunjukkan mengapa mahkamah-mahkamah Malaysia patut campur tangan dengan tindakan AS terutamanya apabila ia berkaitan tuntutan-tuntutan terhadap pihak ketiga.

Diputuskan, menolak tuntutan dengan kos:

(1) Relief di dalam sifat perintah perisytiharan tidak boleh dituntut sebagai hak di bawah s 41 Akta. Apa-apa relief di dalam sifat perintah perisytiharan dan/atau injunksi adalah bersifat budi bicara dan untuk mendapatkan relief tersebut, penzahiran yang penuh dan terbuka adalah perlu dan penting. Walau bagaimanapun, plaintif di dalam kes ini telah gagal untuk memberikan penzahiran yang penuh dan terbuka terhadap kesemua fakta untuk memuaskan mahkamah (lihat perenggan 5 & 14(i)).

(2) Plaintif tidak memohon untuk remedi substantif tetapi perintah perisytiharan dan/atau perintah injunksi untuk tujuan kolateral, yang mana untuk menewaskan atau untuk membela tindakan di dalam bidang kuasa asing. Atas fakta tersebut, mahkamah keberatan untuk menjalankan budi bicaranya apabila ia adalah kes kepelbagaian prosiding dan/atau tujuan kolateral (lihat perenggan 14(ii)).

(3) Plaintif tidak membuktikan kes prima facie untuk relief-relief yang dipohon di dalam undang-undang dan oleh itu tidak terdapat merit di dalam tindakan plaintif dan perisytiharan memohon keterangan dan/atau relief injunksi (lihat perenggan 14(iii)).]

Notes

For a case on anti-suit injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 2864.

For cases on contract of employment, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 862–886.

Cases referred to

Airbus Industries GIE v Patel & Ors [1998] 2 All ER 257, HL (refd)

Amchem Products Inc v British Columbia [1993] 1 SCR 897, SC (refd)

Bata Shoe Company (Malaya) Ltd v Employees Provident Fund Board [1967] 1 MLJ 120, HC (refd)

British Airways Board v Laker Airways Ltd & Ors [1985] AC 58, HL (refd)

Datuk Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (refd)
Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101, FC (refd)
Donohue v Armco Inc & Ors [2002] 1 All ER 97, HL (refd)
NVJ Menon v The Great Eastern Life Assurance Co Ltd [2004] 3 MLJ 38, CA (refd)
Ng Ben Thong & Ors v Krishnam a/l Arumugam [1998] 5 MLJ 579, HC (refd)
Ontario Ltd v Sagaz Industries Canada Inc [2001] 2 SCR 983, SC (refd)
Pedley v Majlis Ugama Islam Pulau Pinang & Anor [1990] 2 MLJ 307, HC (refd)
Sabu Development Sdn Bhd v Kelik Anak Bayel [2007] 8 MLJ 264; [2007] 9 CLJ 475; [2007] 6 AMR 496, HC (refd)
Shen Yuan Pai v Dato Wee Hood Teck & Ors [1976] 1 MLJ 16, HC (refd)
SNI Aerospatiale v Lee Kui Jak & Anor [1987] 3 All ER 510, PC (refd)

Legislation referred to
Civil Law Act 1956 s 11
Marine Insurance Act
Specific Relief Act 1950 s 41

Anthony Tai (Muhammad Suhaili with him) (Suhaili & Bong Advocates) for the plaintiffs.
William Chang Kok Liam (Shankar RP, Asnani & Keith Chin with him) (Thomas, Shankar Ram & Co Advocates) for the defendants.

Hamid Sultan JC:

[1] This is my judgment in respect of the plaintiffs' claim for declarations and injunctive relief (anti-suit injunction) against the defendants to restrain them from prosecuting their USA suit and/or further to instruct their attorneys in the USA in proceedings with or continue to prosecute their USA suit. There are also prayers for general and special damages, interests, costs etc. The claim of the plaintiffs are primarily based on an allegation of employment contract which the defendants' dispute.

[2] At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination-in-chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination. The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purposes, preliminary cross-examination witness

statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

BRIEF FACTS (THE PLAINTIFFS' VERSION)

[3] The plaintiffs say: (i) the plaintiffs were at all material times engaged in the supply of manpower to oil and gas companies worldwide. The first defendant was employed by the plaintiffs to work as a stalking machine operator with STOLT Inc, a company registered in Bahamas, such work to be carried out at the Gulf of Mexico; (ii) the first defendant had induced the plaintiffs to employ him and to enter into an employment agreement dated the 20 April 2001 by making the following representations: (a) that the first defendant was never awarded benefits from industrial injury or illness, (b) that he was never treated for depression, (c) that he was never treated as an alcoholic, (iii) the aforesaid representation was false in that: (a) the first defendant was a crew member of a construction Barge DB29 which capsized near China in 1991, (b) that as result of the said accident, the first defendant developed a post traumatic stress disorder and became an alcoholic, (c) that the first defendant had filed a personal injury suit arising from the said accident in Civil Action No 91–3016 in the Eastern District of Louisiana District Court, (d) that the first defendant was awarded, paid and received (an out of court settlement) in Civil Action No 91–3016 a substantial sum of US$220,000; (iv) had the first defendant disclosed that he had received benefits from industrial injury or illness, the plaintiffs would not have employed him and entered into an employment agreement with him.

The plaintiffs say as per their original statement of claim that they are entitled, inter alia, as prayed for:

(1) a declaration that the employment agreement is null and void;

(2) an injunction against the defendants whether by themselves, their servants agents or otherwise howsoever called be restrained from prosecuting their US suit and/or to further instruct their attorneys in the United States of America in proceeding with or continuing to prosecute the US suit;

(3) a declaration that the plaintiffs are entitled to be fully entitled to be indemnified by the defendants against all claims and sums as may be ordered or awarded in the United States of America District Court at Galveston Country, State of Texas in Cause No 03 CV057610th (for brevity 'the US suit');

(4) special damages in the sum of RM302,600;

(5) general damages to be assessed;

(6) interest thereon at 8% pa, pursuant to s 11 of the Civil Law Act 1956 (Act 67) from, the date of summons until judgment and thereafter at 8% pa until full settlement;

(7) costs; and

(8) such further or other reliefs as this honourable court deems fit and just.

[4] The defendants say: (i) that there was no evidence adduced by the plaintiffs to show that there was an employment, agreement made between the plaintiffs and the first defendant dated 20 August 2001; (ii) the first defendant was at all material time an employee of Stolt Offshore Inc, a company registered in Bahamas to work in the Gulf of Mexico; (iii) the first defendant at all material time before the accident on Derrick Lay Barge DL 801 on 15 May 2001 was a physically and mentally fit person to work as a rigger.

In brief the defendants' defence is that the plaintiffs' claim is frivolous, vexatious, oppressive and constitutes an abuse of the process of the court and ought to be dismissed with costs.

PRELIMINARIES

[5] Two witnesses gave evidence on behalf of the plaintiffs. The first defendant did not give evidence on the ground that he is not medically fit and presently seeking treatment in USA. Notwithstanding the fact the plaintiffs say that there was an employment contract with the first defendant, the employment contract was not produced, neither was there any evidence of the terms of the employment in the usual form within the framework of labour law or industrial jurisprudence. Nothing was also pleaded in the statement of claim. The plaintiffs also failed to answer more than 20 cross-examination questions, which I think is relevant to the case and the defendants are entitled to ask them in cross-examination and the plaintiffs are obliged to answer the same, taking into consideration that the plaintiffs are seeking declaratory reliefs and injunction which in essence requires full and frank disclosure of all material facts to the satisfaction of the court before the remedies can be advanced. This at the outset, I will say the plaintiffs had failed to do.

[6] There were some amendments to the plaintiffs' statement of claim which I need not set out here. The statement of claim in the original form, inter alia, reads as follows:

> At all material time, the plaintiff is engaged in manpower supply to oil and gas companies worldwide.

A At all material time, the second and third defendants are respectively the mother and father of the first defendant.

By an agreement made on the 20 April 2001, the plaintiff agreed to employ the first defendant as a Stalking Machine Operator with Stolt Offshore Inc, a company registered in Bahamas, such work to be carried out at the Gulf of Mexico.

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In order to induce the plaintiff into entering the employment agreement with the first defendant, the first defendant represented to the plaintiff, amongst others, the following matters:

C (i) that he had not been rejected for employment for medical reasons;

(ii) that he had not been awarded any be benefit for industrial injury/illness;

(iii) That he had not been treated for a mental condition, eg depression;...

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THE PLAINTIFFS' ARGUMENT

[7] Learned counsel for the plaintiffs in the first submission without going E too much through the evidence has meticulously and fairly set out the plaintiffs' argument. In contrast, the defendants have submitted in length, short of a thesis. However, learned counsel for the defendants, have dealt with a number of relevant issues and law which was material for writing this judgment.

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[8] The plaintiffs say that s 41 of the Specific Relief Act 1950 is a provision that confers a right to the plaintiffs to seek a declaration, and asserts that it is a provision that confers a right. They say that so long as it is made for a purpose and not just as a busybody seeking a declaration, the court has full G discretion. The plaintiffs' assert that a declaration may be awarded to one whose legal right on the defendants are already being threatened. The plaintiffs in all fairness concedes that a declaration will not be granted if plaintiff have an alternative remedy. The plaintiffs say in the circumstances of the case, the court should exercise its discretion for the following reasons: (i) H that the plaintiffs have no alterative remedy, (ii) that the legal right involved is not academic or hypothetical, (iii) the declaration sought is not to his future right but rather to his present right, (iv) there is a real or pending threat to the plaintiffs' legal right as clearly shown by the defendants' own bundle of document. The first defendant and his parents had instituted a I negligence suit in USA against his employer namely Perkasa Padu Sdn Bhd in respect of injuries allegedly sustained by Rayong ak Nuing in the course of his work on board a maritime vessel DLB8O1. This threat has never been denied and has not been withdrawn and says (i) even as to declaration of future right its importance for certain purpose is not in doubt particularly

where declaration is usually the only remedy, (ii) a declaration order will eliminate anxiety of having to live under a cloud of fear.

[9] The plaintiffs rely on the following cases namely: (i) *Pedley v Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 MLJ 307, (ii) *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101, (iii) *Datuk Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, (iv) *Ng Ben Thong & Ors v Krishnam a/l Arumugam* [1998] 5 MLJ 579.

THE DEFENDANTS' ARGUMENT

[10] The defendants say the non-production of employment agreement between the plaintiffs and the first defendant is fatal. And among others, the defendants rely on the following cases namely:

(a) *Bata Shoe Co (M) Ltd v Employees Provident Fund Board* [1967] 1 MLJ 120 where the court stated:

> Whether or not a particular contract is a contract of service is a question of fact, depending upon the terms of the engagement, the method of remuneration, and the power of controlling and dismissing the workmen, although none of these factors is by itself conclusive.

(b) The Supreme Court case of Canada in *Ontario Ltd v Sagaz Industries Canada Inc* [2001] 2 SCR 983 where the court held:

> There is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. What must always occur is a search for the total relationship of the parties. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor.

(c) *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38 where the court held:

> This is because the construction of a contract was a question of law for determination by the court and not by witnesses through their oral evidence.
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> ... Their views are entirely irrelevant; as irrelevant as the views of the witnesses who gave their interpretation of the financial orders in *Reynolds*.

> In the instant case, the learned judge referred to the oral testimony and relied upon it for the interpretation of the agreements and circulars. That, in our view is clearly an inadmissible method of construction.

[11] The defendants assert that this is one of the rare cases in Malaysia where plaintiffs had sought anti-suit injunction and declaration to restrain the defendants from prosecuting the US suit and against a third party. They say that the Malaysian courts have no interest or connection at all with the claims of the USA suit, and further the plaintiffs had not shown why the Malaysian courts should disregard the concept of judicial comity and interfere with the US suit, when it also concerns claims against third parties.

[12] In support of the above arguments the defendants rely on the following cases namely:

(a) *SNI Aerospatiale v Lee Kui Jak & Anor* [1987] 3 All ER 510 where it was stated:

> In the opinion of Their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive.
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> So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him.

(b) *Airbus Industries GIE v Patel & Ors* [1998] 2 All ER 257 where it was held:

> As a general rule, before an anti-suit injunction could be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction, comity required that the English forum should have sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which such an injunction entailed.
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> … Since, in the instant case, the English court had no interest in, or connection with, the matter in question, and the defendants had not appealed from the judge's decision not to enforce the judgment of the Indian court, but were relying simply on the English court's power to grant an injunction, the court could not grant the injunction sought because it would be inconsistent with the principles of comity.

At p 8:

> It requires that the court should have regard to comity, and should only grant an anti-suit injunction to protect its own jurisdiction or to prevent evasion of its public policies: see eg *China Trade and Development Corp v MV Choong Yong* [1987] 837 F 2d 33 ...
>
> On this approach, an anti-suit injunction will be granted if the foreign proceedings are vexatious, oppressive or will otherwise cause inequitable hardship. In deciding whether to grant an injunction, the court will take into account the effect on a foreign sovereign's jurisdiction as one factor relevant to the grant of relief (see *Philips Medical Systems International BV v Bruetman* [1993] 8 F 3d 600 at p 605 per Judge Posner), but will require evidence that comity is likely to be impaired (see *Allendale Mutual Insurance v Bull Data Systems* [1993] 10 F 3d 425 at p 431 per Judge Posner).

(c) *Donohue v Armco Inc & Ors* [2002] 1 All ER 97 where the court opined:

> However, the court might well decline to grant an injunction or stay where the interests of parties other than parties bound by the exclusive jurisdiction clause were involved or grounds of claim not the subject of the clause were part of the relevant dispute so that there was a risk of parallel proceedings and inconsistent decisions.

(d) *Amchem Products Inc v British Columbia* [1993] 1 SCR 897 (Supreme Court of Canada) where it was stated:

At p 5:

> A court should entertain an application for an anti-suit injunction only where a serious injustice will occur because of the failure of a foreign court to decline jurisdiction applying the forum non-convenience test.
>
> Consonant with the principles of comity, the decision of the foreign court should not be pre-empted until a proceedings has been launched in that court and the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings and failed.

At p 7:

> The court will not generally grant an injunction if it will unjustly deprive the plaintiff of advantages in the foreign forum, having regard to the extent that the party and the facts are connected to it. A party can have no reasonable expectation of advantages available in a jurisdiction with which the party and the subject matter of the litigation has little or no connection.

A At p 41:

> In order to resort to this special remedy consonant with principles of comity, it is preferable that the decision of the foreign court not be pre-empted until a proceeding has been launched in that court and the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings but failed.

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At p 42–43:

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> The first step in applying the *SNI* analysis is to determine whether the domestic forum is the natural forum, that is, the forum that on the basis of relevant factors has the closest connection with the action and the parties. I would modify this slightly to conform with the test relating to forum non-convenience. Under this test the court must determine whether there is another forum that is clearly more appropriate. The result of this change in stay applications is that where there is no one forum that is the more appropriate forum, the domestic forum wins out by default and refuses a stay, provided it is an appropriate forum. In this step of the analysis, the domestic court as a matter of comity must take cognisance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to forum non-convenience outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed.

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(e) *British Airways Board v Laker Airways Ltd & Ors* [1985] AC 58 (House of Lords) where the court declared:

> … allowing Laker's appeals in BA's and BC's actions, that, since the allegations in Laker's complaint against BA and BC in the American action disclosed no cause of action justiciable in an English court, the case was one where there was a single forum only of competent jurisdiction to determine the merits of Laker's claim, that forum being a foreign court, and in such a case to enjoin Laker from having access to that court would prevent their claim altogether from being decided on the merits in their favours that in those circumstances it was necessary for BA and BC to show that they were entitled under English Law to a legal or equitable right not to be sued in the American action and the question accordingly was whether it would be unconscionable, and thus unjust, on the part of Laker to sue them in that action; and that, on the facts, the plaintiffs, who had accepted when becoming parties to Bermuda 2 that they were subject to the private law of both countries, had failed to make out a case of unconscionable conduct on Laker's part.

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[13] The defendants say that the court should invoke adverse presumption on the plaintiff's failure to produce the employment agreement in writing and rely on the case of *Shen Yuan Pai v Dato Wee Hood Teck & Ors* [1976] 1 MLJ 16 where it was held:

> On p 1004 of *Sarkar on Evidence* (12th Ed) the following passage occurs under the caption of 'presumption from not calling witnesses acquainted with facts and keeping the adversary out of possession of evidence':
>
> > Everything is to be presumed against a party who keeps his adversary out of possession of evidence by taking means of retaining the evidence in his own custody. A similar presumption may also arise when a party does not call witnesses who are within reach and are acquainted with the facts of the case ...

[14] I have heard the evidence, read the documents and submissions of the parties in detail. I take the view that the plaintiffs' suit must be dismissed. My reasons are as follows:

(i) I disagree with the plaintiffs' proposition that the relief in the nature of declaratory orders can be claimed as of right under s 41 of the SRA 1950. Reliefs in the nature of declaration and/or injunctive orders are discretionary in nature and to secure such relief, full and frank disclosure is necessary and essential. I have dealt with this area of law in detail in the case of *Sabu Development Sdn Bhd v Kelik Anak Bayel* [2007] 8 MLJ 264; [2007] 9 CLJ 475; [2007] 6 AMR 496. That part of the judgment reads as follows:

> The plaintiff's reliance on the views of learned author PW Young in his book on *Declaratory Order* was not sufficient to satisfy the threshold requirement before the court could exercise to grant the declaratory relief. The very important principle in my judgment which must be adhered to before declaratory relief could be considered was for the plaintiff to ensure that all necessary and interested parties were before the court and only thereafter can the views of PW. Young become relevant. The matter does not end there. The plaintiff must also satisfy the requirement set out in the Specific Relief Act 1950 (SRA 1950) because the Act specially dealt with declaratory orders and decrees. Section 41 of the SRA 1950 read as follows:
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> > Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief provided that no court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration or title, omits to do so.
>
> Section 41 of the said Act must be read with O15 r 16 of the RHC 1980 which states:

A

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

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This section and O 15 r 16 of the RHC 1980 is patently in conflict. Similar provision as this section and the said order is found in India. In construing the provisions, the Privy Council in *Kathamar Nachiyar v Dorasingha* [1875] 21 A 169 has held that the courts in India had no power to make a merely declaratory decree otherwise than under the section.

C

Under this section, there is a need to seek 'further relief than mere declaration'. (Emphasis added). This is not a requirement under O 15 r 16. Declaratory orders cannot be granted when the strict requirement set out in this section is not satisfied. Our courts have endorsed the criteria set out by PW Young in his book *Declaratory Orders* (2nd Ed) where he says that the criteria required before there can be declaratory orders are as follows: (a) there

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must exist a controversy between the parties; (b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which usually referred to as 'standing' or 'locus standi'; (d) the controversy must be subject to the court's jurisdiction; (e) the defendant must be a person having a proper or

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tangible interest in opposing the plaintiff's claims; (f) the issue must be ripe, ie it must not be of academic interest hypothetical or one whose resolution would be of no practical utility. In the light of s 41 of the Act, the proposition stated by the learned author PW Young cannot be read in isolation. Further, it will appear that the literal reading of O15 r 16 of the RHC 1980 will be ultra vires s 41 of the SRA 1950.

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In my view, pure reliance on English authorities and books now (after 50 years of independence) in almost all cases will not reflect our legislative intention and scope of the relevant Acts. In my view less dependence will pave way for independence in the development of law and legal jurisprudence. This is so because many of our legislative provisions are not

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applicable in England or other jurisdiction in the commonwealth. It is often unnecessary to rely on authorities when the Act and Rules are extremely clear. The plaintiff need only comply with the basic rules and statutory provisions to obtain the relevant relief. It is unnecessary as in this case to place heavy reliance on cases when the Act and Rules for declaratory relief are clear and

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self explanatory, and the discretion to grant the relief is vested in the courts.

For reasons stated above, notwithstanding there are some merits in the plaintiff's submission I take the view that the plaintiff has not satisfied the legal and procedural requirements and has taken much of courts time and on the facts of this case it can be said that the plaintiff's application is frivolous,

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vexatious and abuse of process of court. To avert such application, I take the view that the solicitors must be asked to bear the costs as in doing so it will stand as a deterrent for filing unmeritorious application and this will also be a step to reduce backlog of cases. It is my judgment that the plaintiff's originating summons must be dismissed with costs to be taxed and paid to the defendant. As the defendant is not before the court but has been served

the learned deputy registrar shall send a copy of this judgment to the defendant and inform her that she is entitled to tax the costs. I hereby order so.

(ii) In this case, the plaintiffs are not seeking a substantial remedy in this court. The whole purpose of the said declaratory order and/or injunctive order is for a collateral purpose that too, to defeat or to defend an action in a foreign jurisdiction. On such facts, court will be reluctant to exercise its discretion when it is seen to be a case of multiplicity of proceedings and/or collateral purpose.

(iii) Prima facie, I do not find any merit in the plaintiffs' suit and evidence, seeking declaratory and/or injunctive relief, in law and/or on the facts. More so, when the plaintiffs had not shown any employment contract or continuous payment of salary or compliance of employment law or industrial law etc, or employment contract under the Marine Insurance Act in relation to sea men or sea farers. I will say that the plaintiffs have not made out a prima facie case for the reliefs sought for in law as adumbrated in *Sabu*'s case.

[15] For reasons stated above, I dismiss the plaintiffs' suit with costs to the defendants. The getting up fees shall not exceed RM50,000. If costs cannot be agreed, the defendants are at liberty to tax the costs.

I hereby order so.

Claim dismissed with costs.

Reported by K Nesan